United States, 370 U.S. 294, 325 (1962). The relevant market for the purpose of determining competitive consequences lies neither at the extreme where a change in price has an infinitesimal theoretical impact on demand for other products nor at the extreme where products are wholly fungible. The search for the relevant market (or "submarket") must recognize "meaningful competition where it is found to exist." United States v. Continental Can Co., 378 U.S. 441 (1964).

28. The "five percent test" utilized by the Department of Justice in defining markets supports not using all CMRS as the relevant product market. The test is designed to examine whether a small increase in price by a would be monopolist would result in significant migration to other products. If so, the universe of relevant products must be expanded until a monopolist could profitably sustain a modest price increase. The relevant product market is generally considered to be the "smallest group of products that satisfies this test." United States Department of Justice, Merger Guidelines - 1984, 4 Trade Reg. Rep. (CCH) ¶ 13,103, at 20,556-67.[39/] Actual price elasticity evidence is often unavailable. Surrogates for cross-elasticity data

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[39/] See also Olin Corp. v. FTC, 986 F.2d 1295, 1299 (9th Cir. 1993).

include "whether the products and services have sufficiently distinct uses and characteristics; whether industry firms routinely monitor each other's actions and calculate and adjust their own prices (at least in part) on the basis of other firm's prices; the extent to which consumers consider various categories of sellers as substitutes; and whether a sizeable price disparity between different types of . . . sellers . . . persists over time for equivalent amounts of comparable goods. . . ." Grand Union Co., 102 F.T.C. 812, 1041 (1983). Given the distinct demand for SMR (dispatch and enhanced wide-area dispatch) services, merely seeing some customers change their subscription does not define a broad market. As AMTA noted, these services lack "functional equivalency" with cellular or PCS.[40/] "The FCC's current approach of addressing ownership limitations on a service by service basis allows the agency to 'fine tune' its efforts to promote competitive opportunities."[41/]

29. Therefore, regardless of which services are addressed for the purpose of equalizing technical rules, the Commission should continue to recognize for the purposes of its analysis of competitive conditions that not all CMRS

40/ AMTA at 28.

41/ Id.

services compete in the same relevant market. In particular, the separate demand for dispatch-based services should be recognized as comprising the core of relevant markets apart from the broad rubric of CMRS.

2. An SMR Spectrum Limitation Is Needed To Preserve Competition

30. Some commenters reference the Commission's earlier finding that non-cellular CMRS services lack market dominance.[42/] Events subsequent to those findings justify the Commission's concern with market power.

31. The market in the Southeast exemplifies the Commission's concerns. There Dial Page (which has merged with Transit) has obtained a self-described "dominant" frequency position.[43/] Although the full scope of control may never have been disclosed to the Commission, the currently proposed Motorola/Dial Page frequency consolidation would result in control over almost all, if not all, of the SMR spectrum in Atlanta.[44/]

[42/] See e.g., AMTA at 30.

[43/] September 9, 1993, Communications Daily, at p. 3; "Dial Page Aims To Dominate Wireless In Southeast" Reuters Business Report, October 24, 1993.

[44/] In 1993, three entities -- Transit, Johnson Communications Corporation ("Johnson"), and Motorola, Inc. --

32. Unlike PCS, the aggregation of SMR spectrum does not result from presumably efficient auction markets, but is instead the result of vendor control and market power. Two years ago knowledgeable observers asserted that SMR would not play a significant role in providing wireless services due to vendor market dominance.[45/] An SMR frequency aggregation limitation will prevent conversion by vendors and their co-venturers of vendor market power into a permanent anticompetitive first mover advantage and will facilitate the deployment of alternate wireless technologies and services to urban and rural consumers.

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held or managed 275 of the 280 Atlanta 800 MHz SMR Category channels. Transit held or managed 170 channels, Johnson, 51 channels and Motorola, 54 channels. Transit and Johnson subsequently have merged (or are now merging), giving Transit effective control of 221 Atlanta 800 MHz SMR Category channels.

In August, 1993, Dial Page announced its merger with Transit. In October, 1993, Motorola announced its intention to sell its southeast 800 MHz SMR properties to Dial Page. From what has been made public, Motorola will transfer these licenses (and $30 million), including the licenses covering Atlanta, to Dial Page for 11.74 million shares of Dial Page stock and one million warrants to purchase Dial Page stock. Motorola is apparently committed to delivering control of its 54 Atlanta 800 MHz SMR Category channels to Dial Page, giving Dial Page its total of 275 SMR Category channels in the Atlanta area. In fact, Dial Page may control 100 percent of the 800 MHz SMR allocation in Atlanta.

45/ Calhoun, Wireless Access And The Local Telephone Network 197 (1992).

33. The Commission's concerns with unwarranted anticompetitive spectrum aggregation are well-founded and warrant adoption of Southern's proposal. It also follows that the Commission should preserve its authority to reclaim frequencies and should adopt a broad standard of frequency attribution based on practical control.

D. Nextel's Proposal to Allow Consolidation of Wide-Area SMR Spectrum Contravenes the Public Interest and is Beyond the Scope of this Proceeding

34. If there is a principal theme underlying all the Comments in this proceeding, it is that the Commission should exercise caution in implementing changes for services which are now technically disparate. U. S. West urges the Commission to meet its congressional mandate by adopting only the simplest operational and technical requirements here, and by addressing the more difficult technical questions in later proceedings.[46/] At the other end of the spectrum, Nextel advocates a hurried, drastic change to the Commission's licensing process for SMRs. Nextel proposes that the Commission grant certain wide-area 800 MHz SMRs the authority to clear, within MTAs, 200 contiguous SMR channels by "re-tuning" the current occupants to alternate 800 MHz

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[46/] Comments of U. S. West at 6-8.

frequencies. In effect, Nextel proposes overhauling the 800 MHz allocation for Part 90 services.

35. Southern opposes the substance of Nextel's proposal because it essentially would sanction unjustifiable consolidation of SMR spectrum. In its Comments, Southern has proposed that a better approach to the Commission's proposed spectrum cap would be to preserve competition within the wide-area SMR industry through a service-specific spectrum cap. Limiting this nascent service to a single provider in virtually every area, as Nextel proposes, is anathema to the Commission's public interest mandate.

36. Southern also opposes the Nextel plan on procedural grounds. First, in the event of competing requests for re-tuning authority, Nextel suggests that the Commission divvy up the 200 contiguous channels proportionally based on the number of operational mobile units which each wide-area SMRs has. Such a blunt approach would not meet the Commission's obligations under the Ashbacker doctrine or under its other frequency assignment mechanisms. Equally fundamental, Nextel's far reaching proposal is beyond the scope of this proceeding.

1. The Public Interest Requires Vibrant Competition within the Wide-Area SMR Industry

37. An additional theme running through the Comments it is that, in attempting to achieve its general regulatory goals, the Commission must recognize the historical and real-world differences among services. As Southern has argued throughout, there are irremediable distinctions between the SMR service and other broadband CMRS offerings: station-by-station licensing, relatively limited spectrum for numerous providers, and different target markets. These distinctions are rooted in fundamental licensing and allocation decisions the Commission made two decades ago.

38. To fortify its already dominant position in the emerging wide-area SMR industry, Nextel urges the Commission to ignore a significant part of this reality -- the disparate allocations for cellular and private radio services. Nextel suggests that, in order to level the playing field vis-a-vis it and cellular providers, the Commission should grant a single wide-area SMR provider authority to consolidate in each MTA 200 contiguous 800 MHz SMR channels. The plan, Nextel suggests, would be the best mechanism for fostering competition within the wireless marketplace. Clearly, the plan would be best for Nextel, which controls the vast majority of all SMR spectrum

throughout the United States.[47/] It actually would disserve the wireless market.

39. No technical change to the SMR rules could alter the disparate spectrum allocations. Each cellular carrier always will have 25 MHz of contiguous spectrum. Under Nextel's plan, a wide-area SMR will have access to only 40 percent of that, and in practice, that amount would turn out to be much smaller. Nextel's Comments gloss over the extraordinary congestion already extant in the 800 MHz spectrum available under Part 90. With all the 800 MHz spectrum already assigned in all the major markets, it will be impossible for any wide-area SMR, no matter how well financed, to clear 200 channels for itself throughout an MTA.[48/] There is nowhere near enough clear spectrum available to "pack" existing users of the 200 contiguous channels onto other frequencies.

[47/] Nextel has a dominant presence in 45 of the top 50 markets, covering 180 million people. Nextel also has a large stake in other SMRs. OneComm (formerly CenCall) is 37% owned by Nextel. American Mobile Systems is 62% owned by Nextel. SMR in the United States: A Window of Opportunity, Merrill Lynch, October 1993.

[48/] For instance, in its efforts to acquire spectrum in Atlanta, Southern has found that virtually all 800 MHz SMR spectrum has been consolidated by one entity, Dial Page.

40. As a result, wide-area SMRs will continue to be spectrum poor in comparison to other services, and they will have large portions of non-contiguous spectrum.[49/] While consumers eventually may be able to choose among SMR, cellular, and PCS providers, consumers assuredly will be choosing from technologies that have their own distinguishing characteristics (in addition to their distinct functions and target markets as discussed above).[50/] Southern believes that wide-area SMRs will serve their distinct markets within the wireless industry for some time to come. The Commission cannot ignore the competitive environment within the wide-area SMR market by adopting rules which heavily advantage only one company, Nextel.

49/ Nextel's Comments themselves admit that wide-area SMRs will need to continue to employ non-contiguous spectrum.

50/ The Comments roundly oppose any requirement for interoperability among different services. Such a requirement would harm the consumer by substantially raising equipment costs. Southern believes that extraordinary technological advances would have to occur before interoperability is cost-effective and that such advances are at least a decade off.

2. The Commission Must Not Permit Unwarranted Consolidation of the Wide-Area SMR Market

41. Nextel's likely response to this argument would be based on an antitrust concept; i.e., that wide-area SMR and cellular services are substitutable. Southern fully addresses this issue in the preceding section. But beyond that, Southern respectfully suggests that the Commission's public interest mandate is broader than its antitrust concerns. Both the Department of Justice and the Commission seek to protect the public from anticompetitive conduct in telecommunications markets. The Commission, however, has the added responsibility of overseeing and molding discrete telecommunications services which serve unique needs, irrespective of whether an antitrust analysis might suggest different services are substitutable.

42. In this regard, the Commission has a long tradition of taking pro-active steps to avoid monopolization of services notwithstanding antitrust considerations. Throughout its recent history the Commission repeatedly has emphasized the importance of a diversity of providers within services. The division of the cellular service among two providers and the division of the PCS allocation among at least three to four providers are the most appropriate examples. In the ongoing "large LEO" proceeding,

accommodating multiple service providers is major consideration.

43. Nextel also might suggest that its plan accommodates multiple wide-area SMRs in a single market by dividing up the 200 channels among them based on size of their commercial operations. This is a patently self-serving, strawman argument. Nextel admits it has the only operational wide-area SMR. It also states that "by and large, firms pursuing the ESMR initiative unilaterally have established distinct, non-overlapping service areas."[51/] As the Commission will find as it reviews the structure of the emerging wide-area SMR market, with the exception of the Southeastern part of the U. S. where Southern is a competitive entrant with Dial Page, Nextel is correct that ESMRs have chosen not to enter each other's markets. Each of these companies has amassed the vast majority of SMR spectrum in their geographic markets, making new wide-area SMR entry virtually impossible. Accordingly, under Nextel's scheme, in most markets there would be complete frequency consolidation in one dominant company which would be the sole source of the wide-area SMR service, even if the Commission's rules did not sanction it.

51/ Nextel at 16.

44. This type of de facto consolidation or monopolization, however, is equally repugnant to the public interest and that repugnancy already is evident in the SMR market today. The "unilateral" creation of non-overlapping service areas smacks of carving up of markets. The Commission should not adopt a new regulatory mechanism such as re-tuning which can be used to further stifle competition.

3. Procedural Deficiencies in the Nextel Plan

45. Even taking at face value Nextel's proposal for handling competing applications, the plan is deficient. The Commission now has several mechanisms to resolve competing requests for assignments: comparative hearings, lotteries (made more effective by one-day filing windows), and auctions. Dividing up an authorization based on a single factor -- commercially operational mobile units -- is outside the standards of each of these mechanisms.

46. Equally fundamental, the entire Nextel proposal is beyond the scope of this proceeding. It is well settled that an agency is remiss if it rushes to act on a proposal

provided by an interested party without a full consideration of the interests of all of the affected parties.

47. The pertinent section of the Administrative Procedure Act is section 553(c), which provides:

> (c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rule adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

5 U.S.C. § 4(b). The courts have interpreted this provision as requiring an agency to take a "hard look" at the facts and issues surrounding the adoption of a final rule.

48. The Commission cannot meet this obligation in this proceeding. As mentioned, Nextel's proposal is tantamount to an overhaul of the 800 MHz allocation under Part 90. The Commission's Further Notice did not envisage such an extraordinary step (nor, it seems fair to say, did Congress when it passed the Budget Act).

49. "The purpose of the rulemaking process...is to generate comments that will permit the agency to improve on the tentative rule announced in the nature of the rulemaking." AFL-CIO v. Donovan, 582 F. Supp. 1015, 1024 (D.D.C. 1984). "[T]he public must have an opportunity to comment on information that is material to an agency's decision in a rulemaking before the final rule is published." American Lithotripsy Society v. Sullivan, 785 F.Supp. 1034, 1036 (D.D.C. 1992) (emphasis in the original). This principle is especially true when dealing with arcane matters, such as Medicare law and medical procedures, as in American Lithotripsy, or telecommunications law and spectrum issues. In matters such as these, agencies cannot function properly without the benefit of comments from all interested parties. Id.[52/]

[52/] One of the primary reasons for having a comment period is to provide an opportunity for "adversarial discussion among the parties" to the proceeding. Id.

50. The Commission cannot do more than put Nextel's "re-tuning" proposal in a separate proceeding. Taking action on the proposal based on considerations raised only in this proceeding would prove fatal if challenged in court.[53/]

IV. CONCLUSION

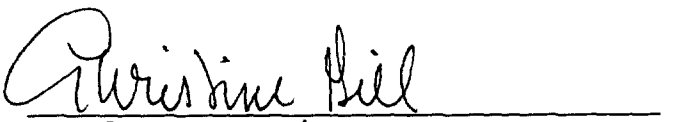
51. In sum, the Commission must implement its authority with due care to ensure that real-world competitive opportunities remain within the wide-area SMR market.

[53/] It also should be noted that a court will not allow short congressional time frames to vitiate the requirement for fully reasoned decisions. In Portland Cement Assoc. v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973), the court stated that, despite the need for expediency, "It is not consonant with the purpose of a rule-making proceeding to promulgate rules on the basis of inadequate data, or on data that, [to a] critical degree, is known only to the agency." Id. at 393.

WHEREFORE, THE PREMISES CONSIDERED, the Southern Company respectfully requests that the Commission act upon its Further Notice of Proposed Rule Making in a manner consistent with the views it has expressed in this proceeding.

Respectfully submitted,

THE SOUTHERN COMPANY



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